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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: MAR 1 2 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a nursing faculty member. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and supporting exhibits.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on April 22, 2009, stating that he "is seeking a full-time position as a Nursing Faculty Member in which he would teach lecture and clinical courses and on-campus labs to RN nursing students." At the time he filed the petition, the petitioner was a full-time registered nurse (RN) at [redacted] Ohio, and a part-time nursing faculty member at [redacted] Ohio. Although the petitioner already held a nursing faculty position when he filed the petition, he did not specify that he intended to remain at [redacted] Rather, he repeatedly stated that his employer was "to be determined."

Apart from the Form I-140 petition and the required Form ETA-750B Statement of Qualifications, the petitioner's initial submission consisted of copies of the petitioner's diplomas, transcripts, and Ohio registered nursing license. Because there exists no blanket waiver for RNs or for nursing faculty members, this evidence does not, on its face, qualify the petitioner for the waiver.

On November 29, 2009, the director issued a request for evidence, stating that the petitioner's initial submission did not establish the national scope of his occupation or demonstrate the petitioner's influence on the field of nursing. The petitioner's response included a statement from attorney [redacted] the petitioner's law partner. [redacted] acknowledged the passage in [redacted] indicating that "the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement." *Id.* at 217 n.3. [redacted] stated: "it is important to distinguish [the petitioner's] teaching of professional adults who travel around the country to serve in the nursing profession from the hypothetical case of the elementary school teacher mentioned in dicta in the [redacted] opinion." [redacted] offered no substantive distinction, however, except to state that nursing instructors are not elementary school teachers.

[redacted] asserted that that the petitioner's occupation is national in scope because his students, upon graduation, will go on to work in other parts of the country. It remains that a nursing instructor can instruct only so many nurses, and that dispersing them around the country diffuses rather than magnifies the direct effect of the petitioner's work. The petitioner submitted no evidence that his intended duties would go beyond a single nursing school (for instance, through development of teaching materials or a standardized curriculum adopted by several such schools).

The petitioner made no attempt to address the third prong of the [redacted] national interest test by distinguishing the petitioner from others in his profession. Instead, [redacted] noted that the Department of Labor (DOL) has pre-certified registered nurses under Schedule A.

The petitioner does not seek a national interest waiver as a nurse (although he is one); he seeks the waiver to work as a nursing faculty member. Nothing in the regulations states or implies that, because nurses fall under Schedule A, Group 1, therefore those involved in training nurses are exempt from the statutory job offer requirement.

The petitioner submitted background evidence about the nursing shortage, and [redacted] asserted that "*instructors* of registered nurses . . . are the direct link to American efforts to eliminate this severe shortage of critical health care providers." [redacted] did not explain how the efforts of one nursing instructor would significantly alleviate the shortage of nurses.

If the worker shortage is as dire as counsel has claimed, and the petitioner is fully qualified for a faculty position at a nursing school, then the labor certification process should not present a significant impediment to the petitioner's hiring at such an institution. The AAO will not consider the hypothetical claim that approval of labor certification is such a foregone conclusion that there would be no point to actually pursuing it. The labor certification process exists as a means of

addressing worker shortages, and such a shortage is grounds for approving a labor certification, not waiving it. [redacted], *passim.*

The AAO notes that, after [redacted] held that the statute did not create blanket waivers for any given occupation, Congress responded by passing new legislation to create such a blanket waiver for certain physicians. *See* section 203(b)(2)(B)(ii) of the Act. This congressional action is of particular note for two reasons. First, it affirmed the finding that the wording of section 203(b)(2)(B)(i) of the Act did not implicitly create any blanket waivers. If it did so, then section 203(b)(2)(B)(ii) of the Act would have been redundant. Second, Congress was obviously in a position to create blanket waivers for virtually any occupation, but it did not do so for nurses or nursing instructors, even though the statute that created section 203(b)(2)(B)(ii) of the Act was called the Nursing Relief for Disadvantaged Areas Act of 1999, Public Law 106-95. Existing immigration policy already makes special allowances for the nursing shortage. Those allowances do not imply that nursing instructors are, therefore, entitled to yet another benefit in the form of a national interest waiver. No blanket waiver exists for nursing instructors and the AAO has no authority to create one.

The director denied the petition on April 5, 2010, stating that the petitioner had not established the national scope of his occupation, or that his "contributions in the field are of such unusual significance that the beneficiary merits the special benefit of a national interest waiver." The director concluded that "the available materials suggest that the petitioner's work as a Faculty member since October, 2008 and as a Registered Nurse since February, 2005 have gone largely unnoticed and have not demonstrated a national impact."

On appeal, counsel asserts that [redacted] requires "case-by-case" determinations on each application for the national interest waiver. When quoting the term "case-by-case" from [redacted] counsel fails to consider the sentence in which that term appears: "It is the position of the Service to grant national interest waivers on a case by case basis, rather than to establish blanket waivers for entire fields of specialization." *Id.* at 217. Counsel does not seek "case-by-case" consideration in this proceeding. Instead, counsel asserts that there is so desperate a shortage of nurses and nursing instructors that the petitioner deserves the waiver simply by virtue of being an RN and a nursing instructor. Prior to the appeal, counsel had made no effort to distinguish the petitioner from other nursing instructors.

Counsel compares the present proceeding to an earlier AAO decision concerning a scientist who had developed "improved pregnancy tests for livestock." Counsel maintains that the petitioner compares favorably with the alien in the earlier proceeding. While the regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. The cited decision is not a published precedent decision. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision.

Counsel then repeats various prior assertions about worker shortages and Schedule A classification for nurses.

In an effort to distinguish the petitioner from others in his field, counsel states:

> We believe the enclosed evidence shows that [the petitioner's] outstanding achievements and ability demonstrate that he can benefit the national interest to a substantially greater degree than someone with only the minimum qualifications of an MSN.
>
> Through his [redacted] membership, his scholarly presentation and article for the betterment of nursing home residents, and his extensive professional training courses, [the petitioner] has demonstrated that he is more capable of benefitting the United States in this area than are instructors of only the "same minimum qualifications."

The petitioner's proper opportunity to submit such evidence was in response to the request for evidence. Submitting this evidence on appeal cannot establish error by the director. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. Counsel cannot reasonably contend that the director should have taken this information into account, when the petitioner did not make the information available until the appellate stage.

The AAO notes that the petitioner did not show that the factors listed above serve to distinguish him from other nursing instructors. The petitioner's "scholarly presentation and article" dates from his graduate studies at [redacted] (Despite counsel's use of the term "article," there is no evidence of publication.) The petitioner submitted nothing to show that his presentation in any way influenced the practice of nursing, nursing education, oversight, or any other aspect of nursing at a national or even local level.

Regarding the petitioner's claimed [redacted] membership, the petitioner claimed this membership on his *curriculum vitae*, but that is simply a claim of membership, not evidence of membership. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Even if the petitioner had documented his membership in [redacted] he submitted no evidence to show that organization's membership requirements. Therefore, this claim has no evidentiary weight in this proceeding.

Counsel refers to unspecified "extensive professional training courses." Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. [redacted], 22 I&N Dec. 221. Taking and passing "professional training courses" does not automatically translate into impact or influence on the field of nursing or nursing instruction. The implicit claim that the petitioner's

training puts him in a good position to make contributions in the future does not establish a prior history of such influence.

For the above reasons, the AAO will affirm the director's finding that the petitioner failed to establish the national scope of his occupation, as well as a record of influence or impact on his field. As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.